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Supreme Court of the United States

October Term, 1957

No. 141

HOWARD D. ABRAMOWITZ,

Petitioner,

v.

WILLIAM M. BRUCKER,

Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

There was no opinion in the District Court. The order granting summary judgment dismissing the complaint appears in the Record at page 22. The Court of Appeals filed a *per curiam* memorandum which has not been reported (R. 23); it held that *Harmon* v. *Brucker*, 243 F. 2d 613 (C. A. D. C., 1957), was controlling. A writ of certiorari has been granted in the *Harmon* case and is now pending in this Court as No. 80, October Term, 1957.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1957. The writ of certiorari was granted on June 17, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First and Fifth Amendments to the Constitution of the United States and Article I, Section 9 thereof.

The statutes [1] involved are:

a) The Act of May 5, 1950, c. 169, 64 Stat. 145, 10 U. S. C. 652a:

> "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

b) Section 248 of the Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 66 Stat. 481, 495, 50 U. S. C. 991):

> "Subject to the provisions of this chapter, the discharge of commissioned officers of the reserve components shall be effected at the pleasure of the President, and the discharge of other members of the reserve components shall be in accordance with regulations promulgated by the appropriate Secretary."

c) Section 249 of the Armed Forces Reserve Act of 1952 (66 Stat. 481, 495, 50 U. S. C. 992), which reads in relevant portion as follows:

> "(a) * * *
>
> (b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or

[1] All three statutes have since been recodified into Title 10 of the Code, by Act of August 10, 1956, c. 1041, § 53, 70A Stat. 641. See 10 U. S. C. §§ 3811, 8811 and 1162. The texts set forth are those in effect at the time this action was commenced. To avoid confusion, prior citations of other statutes now recodified into Title 10 will be given, and reference will also be made to the section of Title 10 into which they are presently codified.

more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

(c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) of this section shall be given a discharge under honorable conditions unless—

(1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved findings of a board of officers convened by competent authority, or

(2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings."

The regulation involved is Army Regulation 604-10, relevant portions of which are set forth in an appendix hereto.[18]

Questions Presented

1. Does the District Court have authority to review the contention of petitioner that the respondent exceeded his constitutional and statutory powers when he gave petitioner an undesirable discharge from the United States Army Reserves based exclusively on allegations that the petitioner, prior to his induction, had engaged in certain lawful political activity?

2. Does Army Regulation 604-10, as applied to the petitioner, violate his rights under the First and Fifth Amendments to the Constitution and Article 1, Section 9 thereof, in that it purports to authorize the respondent to discharge the petitioner from the United States Army Reserves with an undesirable discharge based exclusively on allegations respecting the petitioner's lawful political

[18] The regulation was not published in the Federal Register nor does it appear in the Code of Federal Regulations. Hence, no official citation is possible.

activity engaged in prior to his induction into the Army and prior to the promulgation of AR 604-10 or any predecessor regulation?

3. Is Army Regulation 604-10 on its face unconstitutional?

4. Is Army Regulation 604-10 authorized by the Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 50 U. S. C. 991, 992) or any other statute?

Statement of Case

Petitioner is a citizen of the United States and a resident of the State of New York. On October 15, 1951, at the age of 21, he was inducted into the Armed Forces of the United States pursuant to the Universal Military Training and Service Act of 1951, 50 App. U. S. C. 451 *et seq.* He was engaged in active combat on the Korean front for a year and received a Korean Service Medal with three Service Stars and a United Nations Service Medal for service under fire (R. 2, 3, 12, 13).

Petitioner was released from active service on June 30, 1953, receiving an honorable separation from active duty. Pursuant to statute (50 App. U. S. C. 454) he was transferred to the Inactive Reserves (R. 3, 13).

Over two years later, on July 15, 1955, he received a communication from the Army (Complaint, Exhibit A). That communication stated that information had been received by the Army which furnished reason to believe that petitioner's retention in the Army "may not be clearly consistent with the interests of the national security." Petitioner was advised that he could request a hearing, submit a rebuttal in writing or elect discharge from the Reserves with the understanding that such discharge might be classified as "undesirable." The charges against petitioner were that during 1948 and 1949 he was a member of the Communist Party; that from 1949 to 1951 he was a member of the Labor Youth League; that from 1946 to

1948 he was a member of the American Youth for Democracy and that in 1950 he was a subscriber to the "Worker." The Communist Party, the Labor Youth League and American Youth for Democracy were all described as organizations cited by the Attorney General of the United States as subversive or as Communist (R. 3, 5-7).

Pursuant to the leave granted to him, petitioner submitted a letter of rebuttal on August 25, 1955, in which he pointed out that the letter of allegations related exclusively to his pre-induction political activities and asserted that the allegations did not constitute lawful and proper ground to deprive him of his status as a member of the United States Army or to discharge him under conditions other than honorable (R. 3, 8-10).

On September 30, 1955, petitioner received an undesirable discharge from the Armed Forces of the United States (Complaint, Exhibit E). Thereafter he filed successive applications for review of the discharge with the Army Discharge Review Board (pursuant to 38 U. S. C. 693h) and the Board for the Correction of Military Records (then 5 U. S. C. 191a; since recodified as 10 U. S. C. 1552). Both applications were denied. There are no further administrative remedies available to petitioner (R. 3, 11, 19, 21).

The regulation under which the Army proceeded initially was SR 600-220-1, superseded by Army Regulation 604-10 a few days after the original letter of allegations. For present purposes the old and new regulations are identical.[2] AR 604-10 sets up a series of loyalty criteria for service in the Army, patterned generally after the criteria prescribed for Government civilian personnel in Executive Order 10450, 18 Fed. Reg. 2489, with which this Court is familiar. *Cole* v. *Young*, 351 U. S. 536. Cf. *Peters* v. *Hobby*, 349 U. S. 331. AR 604-10 provides, in Section 19b, that when a discharge is granted pursuant to its terms,

[2] The genealogy of these regulations will be discussed *infra* at page 30.

it shall be marked "AR 604-10 applies." In accordance with that provision, the undesirable discharge granted to the petitioner contains such notation (R. 10).

Petitioner prays that the action of the respondent Secretary of the Army in discharging him from the Army with an undesirable discharge be declared null and void, and that the respondent be directed to rescind his undesirable discharge and grant him an honorable discharge (R. 4).

There being no dispute as to the facts, both parties moved for summary judgment (R. 12, 16). The District Court granted summary judgment dismissing the complaint, holding that it had no authority to review "the granting of particular types of discharge certificate." (R. 22)

Petitioner appealed and the Court of Appeals affirmed in a *per curiam* opinion, stating that it felt itself bound by its decision in *Harmon* v. *Brucker*, 243 F. 2d 613, certiorari granted May 13, 1957, presently pending as No. 80, October Term, 1957. One of the three members of the panel which heard this case expressed dissent from the *Harmon* case and a second expressed a "wish to consider the question anew." (R. 23)

Summary of Argument

I.

Petitioner has a constitutional right to judicial review of the acts of administrative officials who are alleged to have acted in a manner contrary to the Constitution. Even where there is no constitutional issue raised, the District Court has jurisdiction to review action by any administrative agency charged with having acted in excess of its statutory duty. The Army is no exception to this rule. The District Court has frequently reviewed administrative action by the Army and there is no reason why granting of a discharge should be immune from such review, especially when, as here, the regulation under which the Army proceeded violates petitioner's rights under both the First and Fifth Amendments to the Constitution, and, further, exceeds the statutory authority of respondent.

II.

An undesirable discharge issued pursuant to Army Regulation 604-10 results in severe injury to the petitioner. It imposes upon him the "badge of infamy" to which this Court referred in *Wieman* v. *Updegraff*, 344 U. S. 183, 191. It deprives him of statutory rights under the laws of the State of New York and of the United States. It so affects his reputation as to make it virtually impossible for him to secure public employment and most difficult, if not impossible, for him to secure private employment in his chosen occupation. This serious injury is more than sufficient to present a justiciable issue to the Court; it constitutes more than enough to establish a deprivation of property under the Fifth Amendment.

III.

Army Regulation 604-10 is unconstitutional because—

a) It authorizes the United States Army to impose punishment on the petitioner because of his pre-induction civilian conduct;

b) It is unreasonable and arbitrary, having no real relationship to the accomplishment of its alleged purpose, which is to safeguard the security of the Army. Even if the discharge of a soldier may be required for that purpose, the *nature* of the discharge given can have no relation at all to it.

c) It imposes punishment retroactively in that the charges alleged against petitioner relate to the period between 1948 and 1951. The conduct charged, lawful at all times, was not even the subject of regulation until 1954;

d) The regulation in terms is so vague that it offends the due process provision of the Constitution, especially in view of the fact that the area in which it operates affects, in a most intimate manner, the civil liberties of the petitioner.

IV.

There is no statutory authority for the issuance of an undesirable discharge to the petitioner. For almost a century, if not longer, it has been well recognized that the character of a discharge was intended to reflect the military service of a soldier and not his pre-induction or civilian conduct. There is no statute which, given a reasonable reading, can be said to have effected a change in this regard. Certainly, neither the Armed Forces Reserve Act of 1952, 50 U. S. C. 992, nor the Act of May 5, 1950, 10 U. S. C. 652a, upon which respondent relies, have that effect.

ARGUMENT

POINT I

The District Court had power to review the action of respondent in granting an undesirable discharge to petitioner.

The District Court in the instant case held that it lacked "authority to review" the conduct of respondent (J. A. 22). It does not appear that the Court gave any consideration to the constitutional and statutory issues raised by petitioner. The Court of Appeals wrote no opinion in this case, but in the companion case of *Harmon* v. *Brucker*, 243 F. 2d 613, it did consider the constitutional issues raised. It gave no consideration to the statutory issues, though Judge Bazelon, dissenting, urged that it should (243 F. 2d at 627). It held, at page 621, that "the courts have no authority to take such action [to review a discharge]".

There is a constitutional right to judicial review of the acts of administrative officials who are alleged to have acted in a manner contrary to the Constitution of the

United States (*St. Joseph Stockyards* v. *United States*, 298 U. S. 38, 52, 77; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287) or in excess of statutory authority (*Stark* v. *Wickard*, 321 U. S. 288; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Fleming* v. *Moberly Milk Products Co.*, 160 F. 2d 259 [C. A. D. C., 1947]).

Constitutional issues aside, petitioner here raises questions as to the statutory authority for the respondent's action. See *infra*, p. 30.

The District Court must have jurisdiction to review the action of the respondent in the present proceeding, unless we are to reach the conclusion, inconsistent with our entire system of government, that the United States Army, unlike all other parts of the executive arm, can act without check by the courts and that the Constitution is unenforceable against it.

Of course, no such conclusion is permissible, and the courts have always exercised jurisdiction to review Army action. The superiority of civil government over the military has been fundamental to our system of government since the Declaration of Independence charged King George with having "affected to render the military independent of and superior to the civil power." Ten of the original thirteen colonies provided in their constitutions that the military should be subordinate to the civil government.[3] Only on the rarest occasions has the military attempted to

[3] Thorpe, Federal and State Constitutions, 538 (Connecticut); 570 (Delaware); 1688 (Maryland); 1892 (Massachusetts); 2456 (New Hampshire); 2788 (North Carolina); 3083 (Pennsylvania); 3222 (Rhode Island); 3257 (South Carolina); 3814 (Virginia). Many of the states subsequently admitted had similar provisions, *e.g.*, Thorpe, op. cit. 1275 (Kentucky); 1648 (Maine); 1931 (Michigan); 2034 (Mississippi); 3753 (Vermont).

assert that it was not subject to check by the civil courts, and even then such challenge has been unsuccessful. *Ex parte Milligan*, 4 Wall. 2. Not even the gravest national emergency can deprive the courts of their jurisdiction to protect the people of the United States against the invasion of their constitutional rights. *Youngstown Sheet & Tube* v. *Sawyer*, 343 U. S. 579. The Army is no exception to this general rule. *Ex parte Milligan, supra; Duncan* v. *Kahanamoku*, 327 U. S. 304; *Reid* v. *Covert*, 354 U. S. 1.

The courts have on many occasions enforced the Constitution against the Army, as against other branches of the government, and have even taken jurisdiction of claims against Army officers arising out of their conduct in the course of a military campaign. *Mitchell* v. *Harmony*, 13 How. 115. For at least one hundred years the courts have reviewed court-martial proceedings alleged to be illegal. *Dynes* v. *Hoover*, 20 How. 65. This is still true (*Gusik* v. *Schilder*, 340 U. S. 128), despite a statutory provision to the effect that court martial proceedings are not subject to review. 50 U. S. C. 663 (presently 10 U. S. C. 876).

The courts have taken jurisdiction over cases involving Army personnel in a variety of circumstances ranging from situations which have involved the very life of the citizen concerned (*Burns* v. *Wilson*, 346 U. S. 137) to cases which have involved the temporary loss of liberty (*United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 [C. C. A. 3, 1944]) or, sometimes, only compensation. (*Runkle* v. *United States*, 122 U. S. 543; *Shapiro* v. *United States*, 69 F. Supp. 205 [Ct. of Cl., 1947]). In *Nelson* v. *Peckham*, 210 F. 2d 574 (C. A. 4, 1954) a court reviewed the action of the Army in refusing to give a soldier a commission, and directed that the soldier be released from service unless he was given a commission. In *Orloff* v. *Willoughby*, 345 U. S. 83, this Court assumed jurisdiction to decide whether the Army was complying with a Congressional mandate as to the character of the assignment given to an inductee.

It is true that this Court has never had occasion to review the character of a discharge certificate issued by the Army. The issue was raised in *Patterson* v. *Lamb*, 329 U. S. 539, but the Court found it unnecessary to reach the issue.[4]

Although the courts below evidently felt that they had no "authority" to review the Army's action here, even in the face of petitioner's contention that respondent had exceeded both his constitutional and statutory power, we do not understand that the respondent had ever seriously made such a contention. The respondent seems to confine himself to the proposition that a district court has no power to review the valid exercise of administrative discretion, manifested in this instance by the issuance of the discharge in question. (See, e.g., respondent's brief below, pp. 7-14).

This argument, quite different from that made by the courts below, begs the question before the Court. The whole issue before this Court is whether action by the respondent was a valid exercise of discretion. We are advanced not a bit by an argument based on an assumption that it is such a valid exercise. It is hence pointless to urge, as respondent did below, that a court may not "direct the exercise of judgment or discretion in a particular way." (See respondent's brief below, p. 13).

Every other government department is subject to judicial review when it is claimed to be acting in excess of its

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[4] The court below placed considerable reliance on *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C., 1951), cert. den. 342 U. S. 943. In that case the Court of Appeals held that a district court will not revise "merely erroneous findings of fact" by the Army (193 F. 2d at 927). Even that limited decision was made with some hesitation (see footnote 10 at p. 927). No statutory or constitutional issues were raised in the *Gentila* case.

constitutional or statutory authority.[5] "The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Stark* v. *Wickard*, *supra*, at 310. No reason appears for concluding that the Army is exempt from this general rule.

As a matter of fact, the exercise of judicial review is particularly appropriate and necessary here. This case is but one of many arising out of the "cold war" in its constitutional manifestations. The Court has many times in recent years found it necessary to review legislative, administrative and judicial proceedings to protect the constitutional rights of Americans. See, *e.g.*, *Wieman* v. *Updegraff*, 344 U. S. 183; *Peters* v. *Hobby*, 349 U. S. 331; *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234, etc.

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[5] See *Youngstown Sheet & Tube* v. *Sawyer*, 343 U. S. 579 (granting review over the actions of the President of the United States); *Social Security Board* v. *Nierotko*, 327 U. S. 358 (Social Security Board); *Stark* v. *Wickard*, 321 U. S. 288 (The Secretary of Agriculture); *Fleming* v. *Moberly Milk Products Co.*, 160 F. 2d 259 (C. A. D. C., 1947) (Office of Price Administration); *Land* v. *Dollar*, 330 U. S. 731 (Maritime Commission); *Johnston* v. *U. S.*, 175 F. 2d 612 (C. A. 4, 1949) (National Recovery Administration); *The American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (The Post Office Department); *Federal Radio Commission* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266 (Federal Radio Commission); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (Federal Communications Commission); *Estep* v. *U. S.*, 327 U. S. 114 (Selective Service Administration); *Addison* v. *Holly Hill Fruit Products Inc.*, 322 U. S. 607 (Wage and Hour Administration); *Yonkers* v. *U. S.*, 320 U.S. 685 (Interstate Commerce Commission); *Ickes* v. *Fox*, 300 U. S. 82 (Secretary of the Interior).

POINT II

An undesirable discharge from the Reserves, issued pursuant to Army Regulation 604-10, constitutes punishment and results in severe injury to the petitioner.

This would indeed be that "blind" court against which we have been warned by Chief Justice Taft (in the *Child Labor Tax Case*, 259 U. S. 20, 37) and more recently by Mr. Justice Frankfurter (in *United States* v. *Rumely*, 345 U. S. 41, 44) if it were to hold that, in the current political climate, a discharge marked, in substance, "Discharged under the Army's Personnel Security Regulations" is not enough to blight a man's life. As Justice Taft said (p. 37): "All others can see and understand this. How can we properly shut our minds to it?" This Court has recently noted that an employee excluded from public employment for loyalty reasons bears a "badge of infamy." *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Peters* v. *Hobby*, 349 U. S. 331, 347. And at its last term, this Court noted that when witnesses are called by Congressional investigating committees and compelled to testify about unorthodox or unpopular beliefs, "the reaction in the life of the witness may be disastrous." *Watkins* v. *United States*, 354 U. S. 178, 197.

A soldier discharged from the Army with a discharge other than honorable, based on the Army's security regulations, suffers many specific disabilities. They have recently been noted by the Court of Appeals for the Second Circuit in *United States* v. *Ullmann*, 221 F. 2d 760, 761 (C. A. 2, 1955), and by Mr. Justice Douglas in footnote 1 to his dissenting opinion in the same case here, 350 U. S. 422, 440. And see the late Judge Frank in *Schustack* v. *Herren*, 234 F. 2d 134, 135 n. 2 (C. A. 2, 1956). Extensive further elaboration seems unnecessary; we shall list in a footnote

a few of the recent authorities discussing the difficulties faced by one who bears such a stigma.[6]

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[6] PUBLIC EMPLOYMENT:

Kutcher v. *Gray*, 199 F. 2d 783 (C. A. D. C. 1952); *Kutcher* v. *Higley*, 235 F. 2d 505 (C. A. D. C. 1956); *Garner* v. *Board of Public Works*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485.

PRIVATE EMPLOYMENT:

Parker v. *Lester*, 227 F. 2d 708, on remand, 141 F. Supp. 519, affirmed, 235 F. 2d 787 (C. A. 9, 1956); *In re Sperry Gyroscope Co.* v. *Engineers Assn.*, 279 App. Div. 630, aff'd 304 N. Y. 582 (1952); *Fitzgerald* v. *Sperry Gyroscope Co.*, 283 App. Div. 1036 (First Department 1954); *Loews, Inc.* v. *Cole*, 185 F. 2d 641 (C. A. 9, 1950); *United Electrical, Radio & Machine* v. *General Electric*, 127 F. Supp. 934, a'd 231 F. 2d 259 (C. A. D. C., 1956), cert. den. 352 U. S. 872.

PASSPORTS:

Schachtman v. *Dulles*, 225 F. 2d 938 (C. A. D. C. 1955); *Nathan* v. *Dulles*, 129 F. Supp. 951 (D. C. D. C. 1955) app. dismissed, 225 F. 2d 29; *Boudin* v. *Dulles*, 136 F. Supp. 218, mod. 235 F. 2d 532 (C. A. D. C. 1956).

DOCTORS:

Barsky v. *Board of Regents*, 347 U. S. 442.

LAWYERS:

In re Anastaplo, 3 Ill. 2d 471, 121 N. E. 2d 826 (1954) cert. den. 348 U. S. 946

UNITED NATIONS EMPLOYMENT:

Executive Order 10459, 18 F. R. 3183.

Non-judicial comment on the situation is equally impressive. A few of the relevant writings on the subject may be found in: Brown and Fassett, "Security Tests for Maritime Workers", 62 Yale L. J. 1163; Gellhorn, "Security, Loyalty and Science" (1950); Newman, "Control of Information Relating to Atomic Energy", 56 Yale L. J. 769; Brown and Fassett, "Loyalty Tests for Admission to the Bar", 20 Univ. of Chi. L. Rev. 480; Comment, "Loyalty and Private Employment", 62 Yale L. J. 954; Comment, "Passport Refusals for Political Reasons", 61 Yale L. J. 171; Boudin, "The Constitutional Right to Travel", 56 Columbia L. Rev. 47; Bonticou, "The Federal Loyalty-Security Program" (1953); Jahoda and Cook, "Security Measures and Freedom of Thought", 61 Yale L. J. 295; Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale L. J. 1; Gellhorn, "Individual Freedom and Governmental Restraints", pp. 40-46, 131 ff. (1956); for an excellent survey of the situation, see Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York (1956).

The respondent argued below (see brief pp. 7, 17) that statutory benefits due to veterans, by and large, depend on the character of active service and that since petitioner has received an honorable separation from active service, he suffers no financial loss by virtue of the undesirable discharge he has received. To this there are several answers.

In the first place, it is not true that service benefits depend solely upon the character of a soldier's discharge from active service. In New York, where petitioner resides, many benefits are available only to veterans with an honorable discharge from the United States Army and hence would not be available to petitioner.

Probably the most important of these is Section 21 of the New York Civil Service Law which provides veterans' preference in civil service and which defines a veteran as "a member of the armed forces of the United States who served therein in time of war, who was honorably discharged or released under honorable circumstances from such service," the expression of "time of war" being further defined to include service in the Korean conflict. It will be noted that petitioner is a student psychologist; the preponderance of employment opportunities for him will be in state or municipal employment, so that the deprivation of veterans' preference rights is a very real and immediate injury to him (R. 13).

There are many other New York state statutes which limit substantial benefits to veterans with honorable discharges. Included are § 608(1) of the Education Law, which provides war service scholarships to veterans with honorable discharges; §§ 168-176 of the Social Welfare Law which provides many benefits to veterans and members of the families of veterans who have been honorably discharged; § 250 of the Military Law which provides that honorable discharges may be publicly recorded free of charge, and § 32 of the General Business Law, which pro-

vides for the issuance of licenses without payment of the customary license fee to honorably discharged veterans and their widows. See *Horylev* v. *New York State Bonus Commission*, 220 App. Div. 345 (3rd Dept. 1927).[7]

Indeed AR 604-10 itself provides that when a soldier is granted a discharge less than honorable, notice shall be given to the Director of the Federal Bureau of Investigation and the Department of the United States Civil Service Commission. AR 604-10, § 21, *infra*, p. 45. The reason for such notification is, of course, self-evident.

But loss of statutory benefits is the least of the penalties petitioner will suffer. The respondent himself and his subordinates have been much more realistic in dealing with this subject administratively than they are in dealing with it in litigation. It will be noticed that AR 604-10, § 31(c) (2) provides that when a soldier receives allegations reflecting upon his loyalty, he is given the right to tender his resignation, and that a "form letter to accomplish the tender * * * will accompany our letter of allegations dispatched." *Infra*, p. 48. And see the letter of allegations sent to petitioner (R. 7). The "form letter" does not appear in the record. The letter sent out to persons similarly situated reads as follows:

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[7] Even the Federal law with respect to veterans' benefits may deny some such benefits to persons whose status is similar to that of petitioner. For example, the Federal statute giving Civil Service preference to veterans provides that preference shall be given to "those ex-service men and women who have served on active duty in any branch of the Armed Forces of the United States * * * and have separated therefrom under honorable conditions." (5 U. S. C. 851).

.....
(Date)

.....
(Place)

SUBJECT: Application for Discharge in Lieu of Further Proceedings Under Army Regulations 604-10

To: Commanding General
.....Army

1. I, ..., ...
(Name) (Grade)
....., ..., hereby
(Service Number) (Component)
apply for discharge under *other than* honorable conditions, from my status as an enlisted member of the USAR.

2. The reason for the submission of this application is that proceedings have been initiated to determine whether I should be discharged under the provisions of Army Regulations 604-10.

3. I understand if this application is approved that I will receive an *undesirable* discharge.

4. I understand that I may be deprived of many rights as a veteran under both Federal and State legislation, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

.....
(Signature)

.....
(Permanent Home Address) [8]

[8] The Army regulations do not prescribe the form of letter although the form set forth in the text is the one customarily used. The corresponding Navy regulations, however, do set forth a pre-

The Defense Department has admitted elsewhere that "nobody can question the fact that the person with the less than honorable discharge has curtailed future opportunity by virtue of that fact." Jerome D. Fenton, Director of Industrial Personnel Security Review Program, Department of Defense, so testified on November 23, 1955, before the Sub-committee on Constitutional Rights of the Senate Committee on the Judiciary, 84th Congress, 2nd Session (hereinafter referred to as the Hennings Committee), p. 627. Mr. Fenton went on to say that the consequences of an adverse decision in a security case "are deep" and that he was troubled by them. Hearings, Hennings Committee, *supra*, p. 628.

The consequences of such undesirable discharges are indeed "deep" and it is not only Mr. Fenton who is troubled by them. The action of the Army here is but one aspect of the general loyalty program which has been a part of Government policy since 1947, and which has resulted in so much litigation in this Court and in the lower courts. Even more important than the effect of such program on our civil rights is its effect on our civilization. This is not the time for an extended dissertation on the "inhibiting effect in the flow of democratic expression" (*Sweezy* v. *New Hampshire*, 354 U. S. 234, 248) resulting from the widespread loyalty program. It has stifled free

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scribed form. SECNAVINST 5521.6, Annex 5. Like the Army regulations, the Navy regulations were never published in the Federal Register. The form set forth in the Navy regulations provides in paragraph 5 thereof:

> "I am also aware that if this application and agreement is accepted for the good of the Service, I may subsequently receive a certificate of undesirable discharge from the Service, and I may be deprived of rights and benefits as a veteran under both Federal and State legislation; and that I may expect to encounter substantial prejudice in civilian life in situations wherein the nature of service rendered in, or the separation of service from, the Armed Forces may have a part."

speech among all Americans, has terrorized the academic world, has forced young Americans into a pattern of political conformity, and has transformed our once bold and resourceful country into a nation of timid conformists whose greatest fear is that they will be considered politically unorthodox.[9]

The respondent does not really deny the serious consequences to the petitioner of the action taken by the Army here. He argued below rather that the injuries which befall petitioner under these circumstances are "not legal consequences of the discharge" (Brief below, p. 18). The Court of Appeals below, in the *Harmon* case, made similar argument, saying: "The penalty is the same as that which results from many unhappy experiences." 243 F. 2d at 620.

The answer to this was given by this Court in *Watkins* v. *United States*, 354 U. S. 178, when it said:

> "That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction."

This is particularly true because the consequences of the Army's action are obvious and indeed are, in large part, intended.

Respondent denies that the discharge here was given for the lawful pre-induction political activities of the respondent. Rather he says it was given because petitioner was a security risk, the only evidence thereof being his lawful pre-induction political activities. This is a mere

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[9] A bibliography on this point would be extensive, the subject being one of the favorites of those who discuss the state of our civilization. This Court, of course, is fully aware of the problems raised and has been for many years. See, for example, the *Sweezy* case at pp. 250 and 261.

play upon words and cannot meet either the constitutional or the statutory objections posed by petitioner. When petitioner was called upon to serve his country in the Armed Forces, he did so honorably and well. He saw active service on the Korean battlefield. He received awards for that service and in due course received an honorable separation from service. Further, there is nothing in the record to suggest, and respondent does not assert, that petitioner's conduct while in the Inactive Reserves was such as to give rise to the suspicion that he might be a secu ty risk.[10a] The fact of the matter is that petitioner is being penalized for his conduct prior to induction and not for any other reason.

Secretary of Defense Charles E. Wilson, was quite frank about the procedure being followed here. He is quoted by the respondent as having said:

> "I don't believe you can give anyone a dishonorable discharge for something he did *before he was in the Services.* The best you can do is just get him back out again on some kind of basis that neither puts your stamp of approval on him or gives him a dishonorable discharge. I think it is sort of an intermediate position." (Respondent's brief below, p. 19; emphasis supplied.)

The "intermediate position" the Defense Department devised is the undesirable discharge here given to petitioner. As Secretary Wilson admits, the discharge was given "for something he did before he was in the Service."

[10a] This is not to suggest that the Army has the right to censor the political activities of those in the Inactive Reserves. This would extend Army control over civilian activities for six years after separation from active service.

POINT III

Regulation AR 604-10, under which petitioner was discharged, is unconstitutional.

The regulation under which the petitioner here is proceeding is invalid because:

a) It purports to give to the Army the authority to impose santions upon members of the Armed Forces for their lawful conduct as civilians;

b) It is unreasonable and arbitrary and hence, in violation of the requirements of substantive due process under the Fifth Amendment to the Constitution;

c) If further violates the due process clause of the Constitution, as well as Article I, Sec. 9 thereof, in that it operates retroactively, so that the alleged activities of petitioner, subject to no penalty at the time they took place, are made subject to severe penalty by a regulation subsequently adopted; and

d) The regulation is unconstitutionally vague.[10]

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[10] At least two lower courts which have considered the regulation on its merits, have disapproved of it. *Bernstein* v. *Herren*, 136 F. Supp. 493, 496-497 (D. C. S. D. N. Y., 1955); *Harmon* v. *Brucker*, 137 F. Supp. 475, 478 (D. C. D. C., 1956). In *Levin* v *Gillespie*, 121 F. Supp. 726 (N. D. Calif., 1954), a District Court held that, prior to the adoption of the present regulations, the Army could not give a soldier a discharge less than honorable because he had pleaded his privilege under the Fifth Amendment.

The Army itself, by its highest executive officials, has publicly recognized the inequity of its present regulations. For example, Secretary Wilson is quoted in the Washington Post for February 2, 1956, as affirming a new policy "that no one should be penalized for preinduction conduct". Despite this and other similar statements made at Congressional Committee hearings, corresponding changes in the regulation have not been made.

A. The regulation violates the Constitution in that it authorizes the Army to impose sanctions on the basis of the civilian conduct of the petitioner.

The Army has on recent occasions unsuccessfully sought to try a civilian for offenses committed during prior military service, *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11. On a more famous occasion it unsuccessfully sought to try a civilian for offenses committed in the course of a war. *Ex parte Milligan*, 4 Wall. 2. Cf. *Duncan* v. *Kahanamoku*, 327 U. S. 304. The Navy has unsuccessfully sought to try a man in service for a crime committed during a previous term of service, an honorable discharge having intervened. *United States ex rel. Hirschberg* v. *Cooke*, 336 U. S. 210. And most recently the Army has unsuccessfully attempted to try civilians accompanying the Armed Forces abroad for crimes committed against members of those Armed Forces. *Reid* v. *Covert*, 354 U. S. 1. Here the military seeks to impose sanctions on a member of the Armed Forces, after his honorable separation from active duty, for lawful conduct prior to induction.

Serious question arises as to whether any governmental agency may impose penalties on a citizen of the United States for the charges here alleged. This Court has held that mere membership in an organization on the Attorney General's list of subversive organizations may not serve as a disqualification from government employment. *Wieman* v. *Updegraff*, 344 U. S. 183. The Court of Appeals of the District of Columbia came to the same conclusion in *Kutcher* v. *Gray*, 199 F. 2d 783 (C. A. D. C. 1952), and held further, in *Schachtman* v. *Dulles*, 225 F. 2d 938 (C. A. D. C. 1955), that a citizen may not be denied a passport merely because he belonged to such an organization. And see *Schneiderman* v. *United States*, 320 U. S. 118. Indeed, the entire question of the validity of the Attorney General's list is very much in doubt. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Association of*

Lithuanian Workers v. *Brownell*, — F. 2d — (C. A. D. C. 1957), petition for certiorari pending in this Court, Oct. Term, 1957, No. 295. Cf. *Konigsberg* v. *California*, 353 U. S. 252 and *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

On the basis of the charges—that he was a member of three organizations on the Attorney General's list and that he subscribed to a specified newspaper—petitioner could not have been removed from Government employment nor could he have been denied a passport nor could he have been denied admission to the bar. *A fortiori*, he may not be publicly stamped as a security risk and given such a discharge by the Army as to result in substantial injury to him.

But even if a civilian agency were authorized to disqualify a citizen from receiving benefits available to others solely on the basis of his political association, certainly no such authority can be vested in the Army, under our constitutional structure.

In *United States ex rel. Toth* v. *Quarles*, *supra*, this Court considered a question which was in part the mirror image of that presented here. There the Army sought to try a civilian for criminal conduct committed during service in the Army. Here the Army seeks to punish a member of the Inactive Reserves for conduct (not even claimed to be criminal) occurring prior to induction. The Army has no more jurisdiction over the offense in this case than it had over the person of the petitioner in the *Toth* case.

"* * * [T]he business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes" (*Reid* v. *Covert*, *supra*, p. 35). It certainly is not to impose sanctions on civilians for lawful political conduct. It has always been our proud boast that the "supremacy of the civil over the military is one of our great heritages." *Duncan* v. *Kahanamoku*, *supra*, concurring opinion of

Mr. Justice Murphy, at p. 325. Even the President, in his capacity as Commander-in-Chief, has powers strictly limited by the Constitution. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

This Court has on several occasions outlined in some detail the history both of this country and of England to illustrate "the deeply rooted and ancient opposition in this country to the extension of military control over civilians." *Reid* v. *Covert, supra*, p. 33. In addition to the *Reid* case at the last term, see *Ex parte Milligan, supra; Duncan* v. *Kahanamoku, supra; United States ex rel. Toth* v. *Quarles, supra.*[11]

We suggest that the learned court below was over-impressed with the argument that the Army is the best judge of its own security needs, and that in this area the opinion of a mere civilian, even that of a court, cannot stand against the expert opinion of the military. We think that exactly the contrary is the case. The charges against petitioner relate to the exercise of his constitutional rights. They are similar in nature to the kind of charge which forms the basis of much litigation both in this Court and in the lower federal courts. The agency of the Government which is least qualified to pass upon the exercise of these rights is the military. Army officers, well trained in concepts of discipline, living in an environment where strict conformity is not a vice but a necessary virtue, can hardly be expected to sympathize with the political heretics, the militant non-conformists, the social rebels necessary to the health of a free democratic society. Cf. *Sweezy* v. *New Hampshire, supra.*

"There has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts." *Reid* v. *Covert, supra*, p. 36. If this is true where simple penal offenses are concerned, how much more is it true where the issue involved is the exercise of First Amendment rights!

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[11] And see *supra*, p. 9, note 3.

It is difficult enough for trained civilians to pass upon these issues. There is every reason to believe that those trained in the business of waging and preparing for war are even less qualified to decide these matters.

B. The regulation is unreasonable and arbitrary and hence in violation of substantive due process.

The Army seeks to justify its conduct by arguing the need to maintain security in the Armed Forces. For present purposes, we can assume that the Army has an absolute right to discharge any member of the Armed Forces for any reason which, in its unrestricted judgment, seems to be necessary for its best interests.[12]

But here the Army did more than discharge petitioner; it attached to his discharge a badge of infamy, the consequences of which "may be disastrous." *Watkins* v. *United States*, *supra* at 197. The interest the Army has in preserving its security can be adequately protected by granting discharges based on the character of service rendered. The granting of undesirable discharges based upon the Army's evaluation of a soldier's pre-induction conduct is quite unrelated to any purpose the Army may have.

Even were this a case involving only property rights, the regulation and the action of the Army taken pursuant thereto would be unconstitutional. *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Nebbia* v. *New York*, 291 U. S. 502; *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410. But this case does not involve property rights; it involves personal rights and, moreover, those protected by the First Amendment.

Under such circumstances the action of any branch of the Government must be limited to "the least possible power adequate to the need proposed." *Anderson* v. *Dunn*,

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[12] We make this assumption for purposes of this case and only because petitioner is not here suing for his right to be retained as a member of the Reserves. As an original proposition, we doubt whether the rights of the Army, in a democratic society, can be as absolute as we have assumed.

6 Wheat. 204, 230-231; *Cantwell v. Connecticut*, 310 U. S. 296; *Schneider* v. *New Jersey*, 308 U. S. 147. For "the indispensable democratic freedoms secured by the First Amendment" occupy a "preferred place" in our constitutional scheme. *Thomas* v. *Collins*, 323 U. S. 516, 532.

The Army, of course, argues that this is an emergency, that the existence of the cold war justifies a measure of interference with our civil liberties.[13] "From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights." *Duncan* v. *Kahanamoku*, *supra*, concurring opinion of Mr. Justice Murphy, p. 330. A much greater emergency existed in *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*; yet the Court found the action of the President, taken in his capacity as Commander-in-Chief of the Army, to be unconstitutional.

The personal rights of the petitioner here are entitled to special protection. *United States* v. *CIO*, 335 U. S. 106, 141 (Rutledge, J. concurring); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Thomas* v. *Collins*, *supra*; *Watkins* v. *United States*, *supra*, at 197, 198. Such protection was not afforded to the petitioner here.

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[13] The background out of which these regulations arose gives reason to conclude that the Army was not seeking protection from the petitioner but rather from Senator McCarthy. On January 30, 1954, Major Peress testified before the McCarthy Committee and invoked the Fifth Amendment as to certain questions. Three days later he received an honorable discharge from the Army. This precipitated a characteristic attack by Senator McCarthy on the Army, an attack which, as history shows, ultimately resulted in his downfall. Initially, however, the Army took prompt steps to appease the Senator and to stem the adverse publicity arising from the Peress case. On February 16, 1954, Secretary of the Army Stevens admitted that the Peress case showed defects in Army procedure in handling such cases and stated that an exhaustive investigation would be undertaken. On April 1, 1954, Secretary of Defense Wilson admitted that the Army had committed administrative error in handling the case. Six days later, Department of Defense Directive 5210.9 was issued and SR 600-220-1 was revised to conform therewith on June 18, 1954. Report of the Committee on Government Operations on Army Personnel Actions Relating to Irving Peress, Report No. 856, United States Senate, 84th Cong., 1st Sess.

C. Regulation 604-10 Imposes Punishment Retroactively.

Fair play "is the essence of due process." *Galvan* v. *Press*, 347 U. S. 522, 530. The regulation and its application to petitioner offend the most fundamental concepts of fair play. It imposes punishment retroactively for activities lawful at the time they were engaged in and not even the subject of regulation for years later. If this regulation is authorized by statute (see Point IV, p. 29, *infra*), it is an unconstitutional bill of attainder; if not, it is *a fortiori* unlawful.

The regulation in question was promulgated on June 29, 1955. Its predecessor regulation, SR 600-220-1, bears date of June 18, 1954. The conduct here charged against the petitioner goes back to 1946.

The several evils combined in bills of attainder are all present in this regulation. It inflicts harm on petitioner which will continue throughout his life, whenever he must present proof of his Army service. *Cummings* v. *Missouri*, 4 Wall. 277, 323. This punishment is inflicted without judicial trial because petitioner is allegedly a member of an ascertainable political group, and not because he committed any criminal act. *Calder* v. *Bull*, 3 Dall. 385, 388, 389. The proceeding assumes petitioner's guilt, and calls on him to establish his innocence, subverting the presumption of innocence customarily applied in criminal proceedings. *Cummings* v. *Missouri*, *supra*, at 328.[14]

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[14] The offense is compounded by the fact that, even after the regulation took effect, notice given to the public was insufficient. As we note above, AR 604-10 was not published in the Federal Register and does not appear in the Code of Federal Regulations, although the Army does publish other regulations respecting discharge of personnel because of hardship, minority and related reasons. 32 CFR § 582 *et seq.* The Air Force, alone of the three services, publishes its Regulations respecting security discharges. 32 CFR § 886.

The failure of the Army to publish the regulations would seem to be in violation of the Administrative Procedure Act, 5 U. S. C. 1001, 1002. *Hotch* v. *United States*, 212 F. 2d 280 (C. A. 9, 1954).

D. Regulation 604-10 Is Unconstitutionally Vague.

The regulation in many respects is unconstitutionally vague, particularly the criteria for determining whether an individual is a "security risk" (AR 604-10, § 13b).

Subdivisions (4), (7), (8), (9) and, by reference, (10), (11) and (12) of § 13b all make use of the term "subversive" as a key word. The letter of allegations served upon petitioner likewise makes constant use of that term. It is not defined by the regulation. It cannot imply advocacy of the overthrow of the United States Government by force or other illegal means (*Adler* v. *Board of Education*, 342 U. S. 485) since subdivisions (1), (2), (3) and (4) of § 13b refer to such action. Therefore, the term "subversive", both as used in the regulation and as used in the charges against appellant, must have some other meaning.

Obviously, unless the term is clearly defined, serious abuse must result from its loose use. Thus, the late Justice Jackson, when Attorney-General, accurately described the situation:

> "Activities which seem helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be affected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as 'subversive'." Quoted in Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale L. J. 1, 40.

The regulation contains no definition of the term "subversive"; and it is doubtful whether a definition could be drawn which would meet the requirements of the Constitution and also of those who administer the loyalty pro-

gram. The legislature of New Hampshire tried to define the term; the results appear in *Sweezy* v. *New Hampshire, supra*, at p. 246.

See also the dissenting opinions in *U. S.* v. *Josephson*, 165 F. 2d 82, 96 (C. A. 2, 1947), and *Barsky* v. *U. S.*, 167 F. 2d 241, 262 (C. A. D. C., 1948). In neither case did the majority pass on this issue. And in *Watkins*, p. 214, this Court found the terms "subversion and subversive propaganda" as broad and indefinite as "Un-American".

Equally indefinite terms are scattered through the regulation. See § 13b, subdivisions (2), (4) and (10) ("sympathetic association"); subdivision (2) ("revolutionist", "secret agent"); subdivision (7) ("a front for an organization which is totalitarian, fascist, communist or subversive or which has adopted or shows a policy of defecting or approving the commission of acts of force or violence"); subdivision (8) ("an organization • • • infiltrated by members of subversive groups"), etc.

This Court has but recently discussed the evils of this type of vague standard of conduct. *Watkins* v. *United States, supra* at pp. 201-206. The language limiting the authority of the House Committee on Un-American Activities, found by this Court to be unsatisfactory, is certainly no more vague than the amorphous and general standards set forth in AR 604-10. To compound the evil, § 13 (b) (4) defines as presumptively subversive any organization designated as such by the Attorney General pursuant to Executive Order 10450. The standards set up in said Executive Order are as indefinite as those prescribed in AR 604-10; indeed, in large part, the standards are identical.

This Court has many times discussed the necessity of precise language when private rights are at stake. *Connally* v. *General Construction Co.*, 269 U. S. 385; *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Lanezita* v. *New Jersey*, 306 U. S. 451. The language used here is much more vague in its meaning than that found

insufficient in *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495 and *Winters* v. *New York*, 333 U. S. 507. Where the legislation in question seeks to curb constitutional rights, it must be particularly narrowly drawn "so that the person or persons affected remain secure and unrestrained in their rights to engage in activity not encompassed by the legislation." *United States* v. *CIO*, 335 U. S. 106, 142. Just as the vagueness in the statute creating the House Un-American Activities Committee put this Court "in an untenable position" in attempting "to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference" (*Watkins*, p. 205), so here the Court is in an equally untenable position in seeking to strike a balance between the Army's need for security and the citizen's right to engage in legitimate political activity.

POINT IV

There is no statutory authority for the issuance of an undesirable discharge to petitioner.

The ancestry of AR 604-10 is not difficult to trace. Executive Order 10450, promulgated on April 27, 1953, bears a close resemblance to the Regulation under consideration. Indeed, the criteria set forth in § 8 of that Executive Order parallel, and in many cases are identical with, the criteria set forth in § 13(b) of AR 604-10. The Executive Order, however, applied only to civilian personnel and it recites, as statutory authority for the order, several statutes which relate to civilians only.

Strictly speaking, the authority for the promulgation of security regulations in the Army must be found in Department of Defense Directive 5210.9 issued on April 7, 1954.[15] The criteria for loyalty are the familiar ones and are set forth in § VIII of the Directive. The Department of Defense Directive, however, contains no reference whatever to statutory authorization.

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[15] Like AR 604-10, this Directive was never published in the Federal Register.

A few weeks after Department of Defense Directive 5210.9 was issued, the Army issued its SR 600-220-1, which is the predecessor regulation to AR 604-10, and is for present purposes identical with it. The usual criteria for loyalty are repeated and again there is no reference to any statute which can be claimed to authorize such regulations.

We think respondent will agree that both AR 604-10 and SR 600-220-1 must find their statutory authority in either the Act of May 5, 1950, c. 169, 64 Stat. 145, 10 U. S. C. 652a or in the Armed Forces Reserve Act of 1952, 66 Stat. 481, 495, 50 U. S. C. 991, 992. At least we know of no other statute which might be applicable and the respondent has not referred to any.[16]

The relevant section of the Act of May 5, 1950, 10 U. S. C. 652a, reads as follows:

> "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has

[16] In the hearings before the Hennings Committee, above referred to, Stephen S. Jackson, Assistant General Counsel in the office of the Secretary of Defense, was questioned at considerable length on the statutory authority for the Army's loyalty-security program. He admitted, at p. 488, that there was no "express" statutory authority for Department of Defense Directive 5210.9. After the hearing, at the request of the Committee, he submitted a letter attaching "copies of the pertinent statutes which authorize separation of military personnel" under the security program. Hearings, p. 492. The statutes referred to by Mr. Jackson were the two statutes referred to in the text and 10 U. S. C. 484a, 34 U. S. C. 405a, 10 U. S. C. 580 (Now 10 U. S. C. 3814, 8814; 10 U. S. C. 6392; 10 U. S. C. 3784, 8784) and 5 U. S. C. 22. The first three additional references relate only to officers and have no relevance whatsoever to the problem we are considering here. 5 U. S. C. 22 merely provides that the head of each department is authorized to prescribe regulations for the government of his department, the conduct of its officers and clerks, and the distribution and performance of its business. And see Hearings, pp. 601-603, in which a Defense Department representative testifies that he knows of no other authority.

expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

The relevant section of the Armed Forces Reserve Act of 1952, 50 U. S. C. 992, reads as follows:

"(a) • • •

"(b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

"(c) A member of a reserve component discharged or separated for cause other than as specified in sub-section (b) of this section shall be given a discharge under honorable conditions unless—

"(1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved findings of a board of officers convened by competent authority, or

(2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings."

The question presented is whether either of these statutes, or both, give the respondent the power to issue a discharge from the Army based on pre-induction political activity. Neither statute refers to this matter specifically; if the respondent is to prevail, he must be able to read such authority into the statutes.

"There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged." *United States v. C. I. O.*, 335 U. S. 106, 112. Consideration of that law makes it abundantly clear that there is no statutory authority for the extraordinary power claimed by the respondent.

The applicable section of the Act of May 5, 1950, 10 U. S. C. 652a, has a history even longer than that of our Constitution. Its equivalent appeared in the Articles of War as enacted by the Continental Congress in 1776. See 2 Winthrop, Military Law and Precedents, pp. 844, 1490 (2nd Ed., 1896). It appears as Article 108 of the Articles of War enacted on June 4, 1920, c. 227, subchapter II, 41 Stat. 787, 809. When in 1950, the Articles of War were revised and became the Uniform Code of Military Justice (Act of May 5, 1950, c. 169, 64 Stat. 108; codified at 50 U. S. C. 551 *et seq.*), this section was reenacted and codified in Title 10 of the Code, at Sec. 652a (since recodified as 10 U. S. C. 3811. See p. 2, n. 1, *supra*). The Senate Committee report on the bill specifically stated that Congress intended only a reenactment of preceding law. Senate Rep. 486, June 10, 1949, U. S. Code Congressional Service, 81st Congress, 2nd Session, pp. 2222, 2261.

In 180 years of experience under this section of the law, the Army had never, prior to 1954, sought to discharge for preinduction activity. To the extent to which non-exercise of a power may cast grave doubt on its existence, we have here almost two centuries of such non-exercise. "* * * [T]he want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 352. See also *Mintz* v. *Baldwin*, 289 U. S. 346, 351; *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 51 (C. A. D. C., 1953).

There is here much more than mere non-exercise of a power; it is clear that both the Army and the Courts have long understood that the character of a discharge was intended only to reflect the character of Army service.[17]

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[17] The Report of the Commission on Government Security urges strongly that the type of discharge should depend only on military service. The discharge certificate, the Commission recommended, should not become "an appraisal of a standard of conduct unrelated to the performance of the person's military duties." See Report, pp. 145, 147.

The Supreme Court, in *United States* v. *Kelly*, 15 Wall. 34, approved the opinion of the Judge Advocate General of the United States Army in holding that a discharge certificate " * * * was a formal final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it * * *."

The Attorney General has likewise recognized this to be the character of a discharge. Almost 90 years ago he said:

> " * * * Regularly, an officer or soldier, upon his discharge from service, may be regarded as entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, etc., with either of which conditions an honorable discharge would be incompatible; * * * " 13 Op. Atty. Gen. 16, 18 (1869).

The nature of the discharge granted by the Army is so closely determined by the character of the service rendered that the Army itself has ruled that the character of service during a previous enlistment may not be considered in determining the nature of a discharge. In 1918 the Judge Advocate General of the Army said:

> "A soldier, who was dishonorably discharged in a previous enlistment, was inducted into the service during the late emergency and served honestly and faithfully. Under such circumstances he was entitled to an honorable discharge at the end of his present service. A bad record in a prior enlistment is immaterial in considering the character of the discharge to be granted from his present enlistment." Dig. Op., J. A. G. (1912-1930). Section 271, p. 128, Nov. 30, 1918.

The Armed Forces Reserve Act of 1952 adds nothing to the general picture. The purpose of the Act was clearly set forth in the Senate report on the bill as follows:

"The primary purpose of this bill is to bring together, to the greatest extent practicable, in one statute the great number of laws relating to the reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, which have been enacted during past decades."

* * *

"The second purpose of this bill is to enact, on a basis which is applicable to all of the Armed Forces uniformly, certain new provisions of law which have been shown to be necessary to correct existing defects in policies or practices relating to the Reserve and the individual members thereof.

"The impact of these new provisions of law will not be particularly significant because, with few exceptions, they merely enact into law policies which are now being carried out administratively." Senate Report No. 1795, United States Code Congressional and Administrative News, 82nd Congress, 2nd Session, p. 2005.

The report then goes on to summarize the "new provisions of law". The section under consideration was not listed. Evidently, therefore, Congress considered Section 992 to be merely a reenactment of the law then in effect.

The court below, in *Harmon*, at p. 621, notes that it cannot order the Army "to adhere to traditional practices." The mere fact, however, that the Army has the right to change its practices does not authorize it to act without statutory authority. The issues here are not trivial. They affect the exercise of civil rights by a very substantial portion of the population. Without statutory authority, the Army cannot claim the right to impose political censorship upon the civilian conduct of millions of young Americans of pre-induction age, most of whom are also of University age. *Cf. Sweezy v. New Hampshire*, 354 U. S. 234, 250. We can conceive of no measure better calculated to destroy our democracy.

Even absent constitutional questions, we should argue that under the circumstances much more specific language is required than is found here. The fact that the asserted power by the respondent would raise difficult constitutional questions is even further reason for refusing to give to the statutes quoted the scope claimed by the Army. It does violence to the most elementary principles of statutory construction to attempt to graft such vast powers, of doubtful constitutionality, upon the very general language relied on by the respondents in this case. *United States* v. *Rumely*, 345 U. S. 41; *United States* v. *Delaware and Hudson Co.*, 213 U. S. 366, 407.

CONCLUSION

The judgments below should be reversed, and summary judgment entered in favor of petitioner, directing that respondent issue an honorable discharge to petitioner.

September 19, 1957.

Respectfully submitted,

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APPENDIX

ARMY REGULATION 604-10

Personnel Security Clearance

Military Personnel Security Program

SECTION I

General

1. Purpose and scope. a. Purpose. These regulations prescribe th standard, criteria, and administrative procedures for the reporting, investigation, and disposition of military personnel in the Army Establishment; for the rejection of applicants for appointment or enlistment; and for he rejection of persons who would otherwise be inducted or involuntarily ordered into the Army when retention in or acceptance into the Army is inconsistent with the interests of national security. These regulations do not preclude trial by court-martial when such action is considered appropriate by commanders exercising court-martial jurisdiction. They do not preclude relief from active duty or discharge under other applicable regulations on grounds *other* than security. These regulations should not be used in those cases in which security is not the primary reason for initiation of action. Relief from active duty in lieu of actio nunder these regulations is not authorized nor will action under these regulations be used as the *sole* basis for relief from active duty prior to the adjudi cation of a member's case.

b. Scope. These regulations appiy to all military members of the Army Establishment including members of the National Guard of the United States on active duty and not on active duty and special categories of personnel covered in section VI. The Chief, National Guard Bureau

will issue appropriate implementing instructions governing the National Guard of the United States not on active duty.

2. Definitions. For the purpose of these regulations, the following definitions apply:

• • •

c. Credible derogatory information. Credible derogatory information means information received from any source, which evaluated in the light of all other available information, both favorable and unfavorable, indicates that retention ~~within~~ the Army Establishment of the member concerned may not be, or is not, warranted under the standards and criteria prescribed by these regulations. Examples of information which may be used as a basis for flagging action are contained in paragraph 13.

f. Known communist. A known communist is any person who claims to be a current member of the Communist Party and or any person against whom credible derogatory information exists establishing such current membership.

• • •

3. Policy. a. The Department of the Army will assume, in the absence of evidence to the contrary, that the acceptance or retention of any officer, warrant officer, or enlisted man is clearly consistent with the interests of national security.

b. When it is established that retention of a member is *not clearly consistent* with the interests of national security, he will be discharged; except that an inductee normally will not be discharged as a security risk unless his retention is *inconsistent* with the interests of national security. (The standard for retention in service of an inductee is of necessity somewhat lower than the standard for other categories of personnel. Thus an inductee may be retained to perform his obligated service in a specially controlled duty under conditions which would require dis-

charge of an officer or an enlistee. Also see par. 17b.) In deciding upon the characterization of discharge in such cases, any doubt will be resolved in favor of the member and he will be discharged under honorable conditions. He will, unless otherwise prescribed in these regulations, be discharged with a discharge characterized no higher than "General, under Honorable Conditions."

• • •

5. Utilization of investigative reports. Investigations by agencies of the Army Establishment will develop all relevant facts in favor of, as well as against, an investigated person, with special emphasis being given to that information which supports or refutes an allegation stemming from the criteria hereinafter described. Whenever possible, information will be so presented that its disclosure is not precluded in the interests of national security. In this connection the provisions of paragraph 45f, SR 380-320-10 apply. However, for those informants whose identities are not disclosed, sufficient information will be reported to permit adequate evaluation of the information furnished by them.

6. Control of investigative information. Reports and other investigative material and information developed by investigations conducted pursuant to regulations in implementation of the Army security program will remain the property of the investigative agencies conducting the investigation. Such reports and other investigative material and information will be maintained in confidence, and no access will be given thereto to other departments and agencies conducting security programs except under procedures prescribed by the Secretary of the Army. The release of information derived from Federal Bureau of Investigation or military sources pertaining to investigations of National Guard personnel is governed by procedures established by the Assistant Chief of Staff, G-2, Department of the Army, the Federal Bureau of Investi-

gation, and the Chief, National Guard Bureau. Such information will not be furnished to any State adjutant general or other National Guard personnel not on active Federal service.

• • •

SECTION II

Standard and Criteria

12. Standard. The standard for appointment, enlistment, voluntary call to active duty, or retention in a regular duty status within the Army Establishment will be that, based upon all the available information, it is determined that the appointment, enlistment, voluntary call to active duty, or retention in a regular duty status (par. 9) is *clearly consistent* with the interests of national security. The standard for retention within the Army Establishment on indefinite assignment to specially controlled duties (par. 10) for inductees only will be that retention in such an assignment is *not inconsistent* with the interests of national security.

13. Criteria for application of standard. a. *Sensitive and non-sensitive positions.* An officer or warrant officer of the Army holds a sensitive position by virtue of his commission or warrant regardless of the duties and responsibilities of his assignment. (This provision does not constitute authority for initiation of action to obtain a security clearance under SR 380-160-1.) Nothing herein will preclude the use of assignment to specially controlled duties as a security measure; however, indefinite assignment to such duty in lieu of action under these regulations is not authorized. Upon receipt of a completed investigation, commanders must initiate the action prescribed in paragraph 27 on persons temporarily assigned to specially controlled duties for security reasons.

b. *Criteria.* The ultimate determination of whether acceptance or retention within the Army Establishment of the person concerned is warranted must be an overall common-sense one based upon all available information. The activities and associations listed below, whether current or past, while not all inclusive, are of varying degrees of seriousness, and warrant initiation of action to effect such determination.

(1) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(2) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with any espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of the Government of the United States by unconstitutional means.

(3) Advocacy of force or violence to overthrow the Government of the United States, or of the alteration of the form of the Government of the United States by unconstitional means.

(4) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government

of the United States by unconstitutional means (see SR 600-220-11). (An organization, movement, or group, officially designated by The Attorney General of the United States pursuant to Executive Order 10450, shall be presumed to be subversive until the contrary has been established.)

(5) Performing or attempting to perform his duties, or otherwise acting, to serve the interests of another government in preference to the interests of the United States.

(6) Failure or refusal to sign the loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of the Uniform code of Military Justice, Article 31, in refusing to answer completely the questions contained in DD Form 98, DD Form 390, DD Form 398, or other related forms; pleading protection of the Fifth Amendment or of the Uniform Code of Military Justice, Article 31, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both of conduct of the nature described above and below.

(7) Participation in the activities of an organization as a front for an organization referred to in (4) above, when his personal views were sympathetic to the subversive purpose of such organization.

(8) Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purpose.

(9) Participation in the activities of an organization referred to in (4) above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

(10) Sympathetic association with a member or members of any organization referred to in (4) above. (Ordinarily, this will not include chance or occasional meetings, or contacts limited to normal business or official relations.)

(11) Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to above. A close continuing association may be considered to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with, such persons.

(12) Close continuing association of the type described in (11) above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

(13) Any facts other than as set forth in c below which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States.

• • •

d. *Proscribed organizations.* A list of organizations designated by The Attorney General is set forth in SR 600-220-11. Membership, past or present, or affiliation or sympathetic association with an organization so designated is but one factor to be considered in making a determination in a particular case. In determining whether affiliation with a cited organization warrants further investigation, all facts bearing on the case must be considered including the date, term, and extent of affiliation, the age and circumstances of the individual at the time, the type of organization and its status at the time in question, and the military

service and overall performance of duty of the individual concerned. Careful consideration of all these factors, particularly in the absence of any other derogatory information, may indicate that the initiation of a complaint type investigation is not warranted.

SECTION III

ADMINISTRATIVE PROCEDURES

* * *

d. No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or re-enlistment in the Army.

* * *

19. Type of discharge. a. Where the approved findings of the Army Review Board indicate that a member of the Army Establishment should not be retained under the standards and criteria prescribed in these regulations he will be discharged and the character of the discharge will, except as prescribed in paragraph 17, be predicated upon the gravity of the reasonably substantiated information in derogation. The general premise with respect to characterization of separation as set forth in paragraph 17b is applicable to all categories of personnel (par 3b). Regular Army officers with over 3 years' service as such will be furnished a discharge authorized by section 106, Army and Air Force Vitalization and Retirement Act of 1948 (61 Stat. 1082; 10 U. S. C. 585).

b. The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: "AR 604-10 SPN 82." The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: "AR 604-10 applies." Members relieved from active duty or discharged prior to completion of an action under these regulations will have "Paragraphs 9 and 20 (as appropriate), AR 615-120 applies" entered in item 38, DD Form 214.

• • •

21. Notification to other agencies. In accordance with SR 615-180-1 the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the appropriate local Selective Service Board will be furnished information of the identity of all persons rejected for induction for security reasons. The Assistant Chief of Staff, G-2, Department of the Army, will inform the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the Director, Selective Service System, of all persons denied appointment or enlistment or discharged from the military service as security risks.

• • •

SECTION V

Disposition of Cases

29. General. a. Upon receipt of a case with appropriate recommendation from the Assistant Chief of Staff, G-2, Department of the Army, The Adjutant General will—

• • •

(2) Refer all other cases to a Department of the Army Screening Board for review and recommendations.

• • •

30. Department of the Army Screening Board. A Screening Board composed of a minimum of three field grade officers operates at Department of the Army level. This Board will review all cases received from The Adjutant General, will determine what further action should be taken, and will, except for cases covered by paragraph 31a, return the case to The Adjutant General with a recommendation for such of the following actions as are appropriate:

• • •

c. Initiation of action under MCM 1951, chapter VII, when it appears that there is sufficient evidence to warrant trial, and provided release of such evidence in open court has been authorized by the Assistant Chief of Staff, G-2, Department of the Army.

• • •

31. Follow-up of Screening Board recommendations.

• • •

b. *Action to continue the case.* When the Screening Board recommends action other than to close the case, The Adjutant General will notify the appropriate staff activity and/or field command of action desired. If elimination action or indefinite assignment to specially controlled duties is recommended under these regulations, The Adjutant General will initiate action as indicated in c below.

c. *Letter of Allegations.* Upon receipt of a Screening Board recommendation to initiate elimination action or to indefinitely assign the member to specially controlled duties, The Adjutant General, based on information furnished by the Assistant Chief of Staff, G-2, Department of the Army, will, in conjunction with the Judge Advocate General, prepare a "Letter of Allegations." The "Letter of Allegations" will cite the derogatory allegations against the respondent in sufficient detail to enable him to prepare his defense and will be as complete as security considerations permit. The case together with the "Letter of Alle-

gations" will be transmitted to the appropriate field command for dispatch of the letter to the respondent. Whenever practicable, the field commander will have the letter delivered in person to the respondent concerned and obtain receipt therefor. If personal delivery is not practicable, delivery will be by registered mail and a return receipt "addressee only" will be required. The following additional procedure will apply with respect to members of the National Guard not on active duty: The "Letter of Allegations" will be forwarded direct to the respondent by the Chief, National Guard Bureau (par. 6 applies); the Chief, National Guard Bureau, will forward a copy of the "Letter of Allegations" to the major commander concerned citing the date of dispatch to the respondent; the respondent will acknowledge receipt of the "Letter of Allegations" to the major commander concerned and will make his reply to the major commander concerned; The Adjutant General will forward the case direct to the major commander concerned. The "Letter of Allegations" will refer specifically to these regulations and will inform the respondent that—

(1) He may, in lieu of appearance before a board, rebut the letter in writing within 15 days of receipt and submit such documents as he may desire. Reasonable extension of time may be granted by the field commander.

(2) He may, within 5 days of receipt, request retirement, if eligible, or if an officer, he may tender his resignation, or if an enlisted man, he may request discharge in lieu of further proceedings. Enlisted men who are required to show cause why they should not be retained on specially controlled duties will not be permitted to submit a request for discharge. A member tendering his resignation or requesting discharge must agree to accept discharge of the character specified in the "Letter of Allegations." Final decision as to type of discharge to be

awarded rests with the Department of the Army. A form letter to accomplish the tender or request will accompany each "Letter of Allegations" dispatched.

(3) He may, within 5 days of receipt, request a personal appearance hearing before a "field board" with or without counsel, and if a reservist not on active duty, such appearance will be at his own expense. He will be furnished a military counsel and may select such counsel, if the individual selected is reasonably available. Civilian counsel, if desired, will be at his own expense. The Board will assist him in procuring witnesses who are reasonable available but he will not be entitled to reimbursement for expenses incurred incident to their appearance.

(4) He will elect in writing one of the choices offered in (1), (2), or (3) above. Should he refuse to elect one of the choices offered, he will be advised that his case will be processed to completion and adjudicated by the Department of the Army without any further referral to him. He will be advised also that such adjudication may result in an other than Honorable, General, or Undesirable Discharge.

d. *Follow-up of letter of allegations.* Upon receipt of the respondent's reply to the "Letter of Allegations" or upon expiration of 15 days following receipt of the letter by the respondent, whichever is sooner, the appropriate field commander will take action to refer the case to a field board of inquiry (if requested by the respondent) or to forward the case together with respondent's reply, if any (where appearance before a board of inquiry is not requested), to The Adjutant General with recommendation of action to be taken. The Adjutant General will refer the complete case together with recommendations of appropriate field commanders to the Army Review Board for final review in accordance with paragraph 33.

• • •

33. Department of the Army Review Board. a. Upon receipt of a case with recommendations of the field board of inquiry and approprate field commanders together with aditional comments, if any, from the respondent, or upon the expiration of 10 days plus normal mailing time to and from the respondent following his receipt of transcript of the "Field Board" actions, whichever is later, The Adjutant General will refer the case to the Army Review Board for final review and recommendation.

• • •

e. The Review Board will direct one of the actions indicated in paragraph 32c(7), to include the type of discharge when appropriate, except that when the Review Board decision is to discharge a Reserve officer on active duty or a Regular Army officer with less than 3 years' service as such, the Board will submit the case to the Secretary of the Army for final approval.

f. The decisions of the Review Board, and where applicable, of the Secretary of the Army, will be transmitted to The Adjutant General for necessary action.

• • •

35. Action following final review. The Adjutant General will notify the appropriate field commander of final action to be taken. In cases concerning members of the National Guard not on active duty, the Chief, National Guard Bureau, will be informed of such action.

a. If it is determined that retention of the member is warranted under the standards and criteria prescribed in these regulations, The Adjutant General will close the case favorably as indicated in paragraph 9, and direct the major commander to notify the member in writing and to remove flagging action in accordance with AR 600-31. All information pertinent to the case will be removed from the field military 201 file of the individual concerned.

b. If it is determined that indefinite assignment to specially controlled duties is consistent with the interest of national security, The Adjutant General will direct the major commander to notify the member in writing. Flagging action will be continued in accordance with AR 600-31.

c. If retention of the member is not warranted under the standards and criteria prescribed by these regulations The Adjutant General will direct the discharge of the member from any and all military statuses he may hold, including type of discharge to be furnished. Flagging action will be removed by the Department of the Army in accordance with AR 600-31.